IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4795 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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TOPLAND ENGINES PVT.LTD. &2 - Petitioner(s)

Versus

UNION OF INDIA &3 - Respondent(s)

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Appearance :

MR PARESH M DAVE for Petitioner No(s).: 1,2.

MS SEJAL K MANDAVIA for Respondent No(s).: 1.
MR JITENDRA MALKAN for Respondent No(s).: 1.
RULE NOT RECD BACK for Respondent No(s).: 2,3.

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 01/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The only issue that arises in this petition is as to whether the respondents, more particularly respondent No.3, is entitled to go behind an order of the Tribunal and refuse to implement it by issuing the impugned show cause notice bearing F.No.V84(18)-1236/2004-Ref. dated 3rd February 2005 (Annexure “H”).
2. The petitioner, a Private Limited Company, manufactures Diesel Engines which are admittedly classified under Heading 84.08 of the Central Excise Tariff Act. The Engines are cleared for home consumption on payment of excise duty. The Engines are also removed for captive consumption for manufacturing Centrifugal Pumps commonly described as couple sets. The Excise Department took a view that the Diesel Engine, when cleared for captive consumption, was not chargeable to duty in view of the Notification No.4/97-CE and Notification No.5/98-CE as well as similar Notifications issued from time to time in each financial year and therefore, since the final product, namely, the Diesel Engine was both exempt as well as chargeable to duty, the petitioner was required to pay 8% of the selling price under Rule 57CC of the Central Excise rules, 1944. This finding was recorded in light of the fact that all Diesel Engines were manufactured out of common inputs. The matter was carried further and the Commissioner (Appeals) allowed the appeals holding that Rule 57CC of the Rules is not applicable and the petitioner was entitled to refund of 8% paid under Rule 57CC of the Rules.

   2.1 During pendency of this dispute, department raised another issue: that petitioner is required to reverse 8% of selling price of the centrifugal pump sets. The Commissioner (Appeals) rejected the appeals, holding that the Diesel Engine was covered by the Notification on account of Circular No.224/58/96 dated 26-6-1996 issued by the Central Board of Excise and Customs.

   2.2 The petitioner succeeded before the Tribunal and the Tribunal has found that the engines are separate excisable entities mentioned in the tariff and by application of the rules of classification for parts as provided under the Tariff Act, the engines cannot be termed or classified as parts of Centrifugal Pumps, as contended by revenue. Accepting the stand of the petitioner, it was held that debits of 8% made under protest were required to be reversed and there was no bar of Section 11B of the Central excise Act, nor was the theory of unjust enrichment applicable. Accordingly, all the appeals came to be allowed by the Tribunal. The aforesaid order of the Tribunal was made on 23-7-2003.
3. The petitioner in consonance with the order of the Tribunal moved respondent No.3 vide communication dated 10-11-2004 informing him that the amount reversed under Rule 57CC was liable to be credited in the credit account and sought necessary rectification in this regard. To this, respondent No.3 replied vide communication dated 7-12-2004 (Annexure “F”) wherein it is stated as under :

   “In this regard, I have been directed by the Assistant Commissioner, C.Ex. Dn-I, Rajkot to inform you not to take credit in your account till the amount sanctioned by the

adjudicating authority and sanctioned amount not transferred from the Consumer Welfare Fund to Govt. Account.

In view of above, if, credit of the said amount has been taken by you in your credit account, same may be reversed and details of reversal may be intimated to this office at an early date."

1. The petitioner objected to this vide communication dated 10-12-2004 informing that only a book entry was required to be made and nothing further was necessary. Thereafter, the petitioner was served with the impugned show cause notice dated 3rd February 2005 (Annexure "H").
2. Having heard the learned advocates appearing for the respective parties, it becomes apparent that the respondents, more particularly respondent No.3, has issued impugned notice with a view to delay implementing the Tribunal's order, if not, ignore the same with an intention which is not far to seek. The learned advocate for the respondent has placed great emphasis on paragraph No.3(c) of the Tribunal's order dated 23-7-2003 in support of the contention that the authority is entitled to undertake an exercise of verification as to whether the engines have borne duty. In support of the stand adopted by the respondent, it is submitted that letter dated 7thDecember 2004 (Annexure "F") addressed by the Department does not confer any right to the petitioner as the petitioner would be entitled to re-credit only on establishment of the factum of having paid duty in the first instance.
3. It is not disputed on behalf of the respondent authorities that the order of Tribunal dated 23rd July 2003 has become final, there being no challenge to the said order. In the circumstances, the respondent authority could not have undertaken to ignore the said order by raising an issue which, to say the least, is a non-issue. The Tribunal, in its order dated 23-7-2003, has categorically held in paragraph No.2(b) that, "Engines are cleared for home consumption on payment of excise duty". Nothing has been brought on record to show that the aforesaid finding of fact recorded by the final fact finding authority is incorrect in any manner whatsoever or is not supported by evidence. In fact, as noted hereinbefore, the order of the Tribunal, has attained finality and in the circumstances, it is not possible for any subordinate authority to go behind the said order, more particularly, qua findings of fact recorded by the Tribunal. Therefore, the specious plea made by respondent No.3, to the effect that the petitioner had not established that the engines had borne duty, is not only hollow but bereft of any substance and against the settled legal position.
4. The fact that the impugned show cause notice has been issued at a subsequent stage and after issuance of communication dated 7-1-2004 (Annexure "F") would go to show that the said notice has not been issued with an honest intent. As this Court is not called upon to undertake an inquiry in this regard, suffice it to state that the notice does not appear to be bonafide.

5. As to what is the legal effect of an order of a higher forum has been elaborately laid down by this Court recently in a judgement rendered on 18th March 2005 in case of Milcent Appliances Pvt. Ltd. v. Union of India, in Special Civil Application No.16067 of 2004, by applying the decisions of the Apex Court in case of Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal, (1960) 40 ITR 618, and Union of India v. Kamlakshi Finance Corporation Ltd., 1991 (55) E.L.T. 433 (S.C.) Suffice it to state that the principles of judicial discipline require that the orders of higher authority are required to be followed unreservedly by the subordinate authority; even if an appeal is filed, it cannot furnish a ground for not following the order of the superior forum unless the operation of the order has been stayed by a competent higher forum. In the present case, admittedly the order of Tribunal has not been challenged further. In the circumstances, subordinate authority is bound to follow the same and implement it without any reservation.
6. Vide Circular No.695/11/2003-CX dated 24th February 2003, the Central Board of Excise &Customs has laid down as to in what circumstances the goods must be released or refund must be granted and in this connection, it is stated that “The order of High Court or Tribunal should be implemented unless a stay has been obtained from the higher judicial forum on the implementation of the order. Further, consultation with Board in such cases may cause into delay in finalization of the refund claims”. Accordingly, the Board has directed the jurisdictional commissioners to take decisions in such cases at their level to grant refund.
7. Therefore, applying the aforesaid circular also, if the action of the respondents is tested, it becomes clear that the respondent was not justified in issuing the impugned show cause notice.
8. With the affidavit in reply, the respondent has annexed order dated 4-3-2004 made by a Single Member Bench of the Tribunal in the case of M/s Kapoor Machinery Stores v. The Commissioner of Central Excise, Rajkot, to emphasize the fact that, by a subsequent order, the Tribunal has taken a contrary decision in case of another assessee. The learned counsel for the petitioner has responded to this by placing on record subsequent order dated 29-4-2004 in case of another assessee, namely, M/s Swati Enterprises v. Commissioner of Central Excise, Rajkot to point out that the same Single Member has again taken a different view of the matter by following the earlier decision of Tribunal dated 23-7-2003 acknowledging that while deciding case of M/s Kapoor Machinery Stores, proper facts were not placed before him.
9. However, what is more material to note is that in case of M/s Kapoor Machinery Stores, vide order dated 24-9-2004, a Single Member Bench has allowed application for rectification of mistake by recording that the earlier order dated 29-4-2004 was passed on a wrong appreciation of facts and accordingly, the appeal has been restored to original number.
10. Therefore, the reliance by the respondent on the order of the Tribunal which does not exist any more is misplaced. Even otherwise, it goes without saying that when there are two conflicting orders, one of a Single Member and one by a Division Bench, the order

issued by the Division Bench would prevail.

11. In the show cause notice, the respondent No.3 has placed reliance on Circular No.224/58 of 96-CEX dated 26-6-1996. It is an admitted position that the said circular was cited before the Tribunal in the petitioner's case and has already been considered. Therefore, apart from the position in law as to judicial discipline being required to be maintained, none of the other grounds on which the impugned show cause notice is based survive in law.
12. In the result, the impugned show cause notice bearing F.No.V84(18)-1236/2004-Ref. dated 3rd February 2005 (Annexure “H”) is hereby quashed and set aside. The petitioner is entitled to take credit for the sum as stated in its communication dated 10-11-2004 without being prevented from doing so.
13. The petition is accordingly allowed. Rule made absolute. The respondents shall pay costs quantified at a sum of Rs.5,000/- [Rupees five thousand only]. In the first instance, the same shall be paid by the respondent authorities and thereafter, recovered from respondent No.3 personally.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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